

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

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BRAD ERHART,	)	
	)	
Plaintiff,	)	
v.	)	3:23-cv-05882-TMC
	)	
TRINET HR XI INC.,	)	Tacoma, Washington
SWITCHBOARD TECHNOLOGY LABS	)	
INC, HARTFORD LIFE AND	)	February 8, 2024
ACCIDENT INSURANCE COMPANY	)	
INC,	)	Motion Hearing
	)	
Defendants.	)	1:30 p.m.

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE TIFFANY M. CARTWRIGHT  
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

For the Plaintiff: BRAD ERHART  
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Apartment 101  
Vancouver, Washington

For the Defendant  
Trinet HR Xi: JEREMY F. WOOD  
Fisher & Phillips LLP  
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For the Defendant  
Switchboard: EVA SHARF OLIVER  
Summit Law Group  
315 Fifth Avenue South  
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For the Defendant  
Hartford: SARAH E. SWALE  
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520 Pike Street  
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AFTERNOON SESSION

FEBRUARY 8, 2024

THE CLERK: We are ready to go on the record. This is Erhart versus TriNet HR Xi Inc., et al., CV23-5882-TMC.

Plaintiff Erhart, please make an appearance for the record.

MR. ERHART: This is Pro Se Plaintiff Brad Erhart.

THE CLERK: For Defendant TriNet.

MR. WOOD: Jeremy Wood for TriNet.

THE CLERK: Defendant Switchboard.

MS. OLIVER: Eva Oliver for Switchboard.

THE CLERK: For Defendant Hartford.

MS. SWALE: Sarah Swale for Hartford.

THE COURT: Thank you, everyone.

Especially for Mr. Erhart's benefit, I am going to give an overview of how this will work. Because this is Switchboard's motion, they will speak first and counsel for Switchboard will have the opportunity to present argument and to answer any questions that I put to her, then, Mr. Erhart, I will give you a chance to address me and my questions. Then at the end, it will go back to counsel for Switchboard for their rebuttal. That is how we will proceed.

Ms. Oliver, we will start with you.

MS. OLIVER: Thank you, Your Honor. Good afternoon. Eva Oliver for Defendant Switchboard Technology Labs.

1 Your Honor asked the parties to address *Burnett vs*  
2 *Pagliacci Pizza*. *Burnett* is applicable although  
3 distinguishable. The facts were very important in *Burnett*.  
4 Before I get into how and why *Burnett* applies but doesn't  
5 change the outcome here, I would like to provide briefly some  
6 context about the parties and the agreement at issue in this  
7 case.

8 Mr. Erhart came to Switchboard with over 20 years of  
9 professional experience in software development and  
10 operations. Switchboard hired Mr. Erhart in a high-level  
11 position with a title Senior DevOps Engineer, which came with  
12 a salary, equity and other terms, including a severance  
13 provision that was carefully negotiated by Mr. Erhart.  
14 Mr. Erhart signed the offer letter on August 23, 2021 after  
15 several days of negotiating with Switchboard's CEO.

16 That signed agreement clearly and unambiguously  
17 incorporated a document called the TriNet Terms and  
18 Conditions Agreement, or TCA.

19 TriNet is a national full-service human resources provider  
20 that Switchboard engaged to outsource human resources  
21 functions like payroll benefits and the at-issue dispute  
22 resolution policy, and --

23 THE COURT: So, Ms. Oliver, I would like to talk a  
24 little bit about the offer letter.

25 Just looking at the offer letter itself, nothing in the

1 offer letter mentions arbitration; is that correct?

2 MS. OLIVER: That's correct.

3 THE COURT: The offer letter itself did not attach to  
4 TCA as one of the enclosures sent with it in either the first  
5 offer letter that was sent to Mr. Erhart or the second offer  
6 letter; is that correct?

7 MS. OLIVER: That is correct. The CEO of Switchboard  
8 sent Mr. Erhart the offer letter via -- TCA via email four  
9 days before the final offer letter.

10 THE COURT: Putting aside the email for a moment,  
11 which we will talk about, but putting aside the email from  
12 the CEO, just looking at the offer letters and the  
13 attachments, is that in any way distinguishable from *Burnett*?

14 MS. OLIVER: It is, Your Honor. In *Burnett* the  
15 employee did not have an opportunity to review the  
16 incorporated employee handbook that included the arbitration  
17 provision. Because there was no time to review that  
18 document, the court looked to the face of the signed document  
19 itself to see whether it previewed, that having no  
20 opportunity to review the incorporated document, that there  
21 was an arbitration agreement. It was really because of the  
22 timing that that fact was important in *Burnett*. It is also  
23 important for the purposes of procedural unconscionability.

24 As for mutual assent, there is no rule that a document has  
25 to call out an arbitration provision in an incorporated

1 document for there to be mutual assent.

2 THE COURT: Well, let's look at the language in  
3 *Burnett*. *Burnett* speaks a lot about the opportunity to  
4 review it, but also about the notice of it. It seems to me a  
5 significant part of *Burnett* is that he was not given notice  
6 that the document that was incorporated by reference included  
7 an arbitration provision. That, to me, seems exactly like  
8 the circumstances here. There is nothing in the offer letter  
9 that would put Mr. Erhart on notice that the document that is  
10 being incorporated includes an arbitration clause.

11 MS. OLIVER: I have two answers to that, Your Honor.  
12 First, I would argue that a fair reading of *Burnett* is that  
13 the reason the notice issue mattered is precisely because  
14 there was no time to review the incorporated documents.

15 Another way that there might have been assent is if in the  
16 document signed it called out that there was an arbitration  
17 agreement between the parties.

18 I do not think *Burnett* can fairly be read as requiring --  
19 even where it is a sophisticated person like Mr. Erhart has  
20 four days to review a terms and condition agreement that  
21 includes an arbitration provision --

22 THE COURT: I did ask you for the first series of  
23 questions to put aside the separate email that attached the  
24 TCA. I want to talk first about the offer letter, and then I  
25 want to talk about the circumstances of the other email.

1           If it hadn't been for the separate email, then why would  
2           this arbitration clause be enforceable?

3           MS. OLIVER: Is Your Honor's question if he had never  
4           received the TCA at all?

5           THE COURT: Yes. I am asking you -- I am asking you  
6           to start with the hypothetical, so you can either take the  
7           first offer letter or you can take the second offer letter,  
8           because as I understand the record, neither offer letter says  
9           anything about arbitration and neither offer letter included  
10          the TCA as an attachment. Instead, it informed the employee  
11          that they would get a copy of the TCA later after they began  
12          employment. Is that a fair characterization of the record?

13          MS. OLIVER: Respectfully, that is a characterization  
14          of the offer letter but not the record because, in fact,  
15          Mr. Erhart did receive the TCA and did in actuality have an  
16          opportunity to review it before signing the offer letter that  
17          incorporated its terms.

18          Your Honor, normal principles of contract  
19          interpretation --

20          THE COURT: I do want -- I do want you to answer the  
21          hypothetical question, which is that just because this --  
22          because I want to focus first on the offer letter, and then  
23          talk about the separate email because the offer letter was --  
24          but for Mr. Erhart separately reaching out about a different  
25          question, the offer letter is the only step that your client

1 took to inform him of any of this. I want you to address  
2 that question first because I don't see any way that the  
3 offer letter is distinguishable from *Burnett*, apart from the  
4 argument about the separate email.

5 I understand that argument. I would like to first see if  
6 you have any other arguments, putting that aside, for why the  
7 offer letter alone would still be distinguishable.

8 MS. OLIVER: On its face, the offer letter is similar  
9 to what was presented in *Burnett*. When you are asking a  
10 question of whether there is mutual assent, you look at the  
11 outward manifestations of the parties and circumstances  
12 around the transaction.

13 Your Honor is correct, I am not arguing here that there is  
14 something about the language in the offer letter that is, I  
15 guess, outcome determinative here. It really is that we must  
16 look at the entire transaction and what actually happened,  
17 the parties and the fact that Mr. Erhart did, in fact, have a  
18 reasonable opportunity to review the Terms and Conditions  
19 Agreement.

20 I want to make sure -- I am trying to answer your  
21 question, Your Honor. I want to be sure I am doing that. Is  
22 that answering your question?

23 THE COURT: I think so. Do you agree that if  
24 Mr. Erhart had just signed the initial offer letter without  
25 any follow-up or exchange with the company that the

1 arbitration agreement would be unenforceable?

2 MS. OLIVER: Certainly we would have a situation that  
3 would look a lot more similar to *Burnett*. I think there  
4 would still be a question about opportunity to review and  
5 understand the terms given Mr. Erhart's sophistication, his  
6 apparent ability to ask questions and ask for the Terms and  
7 Conditions Agreement that is incorporated by reference. It  
8 would be a closer case. That is not what we have here.  
9 Your Honor is correct, that would look more similar to  
10 *Burnett* than the situation at hand.

11 THE COURT: I would also be curious to know why there  
12 is no discussion of *Burnett* in either of your briefs.

13 MS. OLIVER: I did not feel we were compelled to  
14 include *Burnett* just on the fact -- factually it is not on  
15 point at all. *Burnett* involves cases where there is no  
16 opportunity to review the agreement.

17 The other reason -- and I think *Burnett* fairly read is on  
18 point. *Burnett* was not a Federal Arbitration Act case.

19 I do want to make this point because the Federal  
20 Arbitration Act -- if *Burnett* could be read as requiring a  
21 special rule for arbitration clauses in employment agreements  
22 under state law, that would be preempted by the Federal  
23 Arbitration Act. In that sense, I guess that is our  
24 reasoning, Your Honor, for not including it in the briefing.  
25 It is helpful as read by us, frankly, as an interpretation of



1 an extreme case where there is not mutual assent because  
2 there was absolutely no opportunity to understand the terms  
3 of the agreement.

4 It is not on all fours with the facts that we have.

5 THE COURT: Well, okay. I mean, I will say that this  
6 is a quote from page 5 of your motion which says: "In  
7 determining whether the parties agree to arbitrate, courts  
8 apply ordinary state law contract principles." You then  
9 proceed in your brief to go on and cite a number of -- you  
10 rely on Washington State law, which in the sentence I just  
11 read you seem to concede applies to contract formation, and  
12 then you go on to cite a number of Washington cases that come  
13 before *Burnett*.

14 The entire time I was reading your motions, I was asking  
15 myself, when are they going to talk about *Burnett*? It was  
16 never there.

17 Then when I read Mr. Erhart's response, though he is  
18 pro se and cannot be expected to have the same grasp of the  
19 relevant case law, he essentially articulates the factual  
20 argument that forms the basis of *Burnett*. So I thought  
21 surely they will address it in their reply brief, and it was  
22 not there.

23 I don't get frustrated with counsel very easily. I like  
24 to let lawyers be lawyers and be adversarial.

25 I think it approaches a serious candor to the tribunal

1 problem, and I do not want it to happen again.

2 I think *Burnett* is the closest binding authority that is  
3 on point. I understand your argument that it is  
4 distinguishable. That does not mean it should be -- that  
5 does not mean it shouldn't be talked about. It means it  
6 should be distinguished.

7 I would just caution you going forward, especially in a  
8 situation where there is a pro se litigant, we are going to  
9 be exceptionally diligent to make sure we are aware of all  
10 relevant case law, and we expect all the parties to brief all  
11 the relevant case law.

12 MS. OLIVER: I understand. I am happy you have given  
13 us this opportunity to address *Burnett*.

14 It was absolutely not intentionally trying to hide  
15 relevant authority from the Court. It is regrettable that  
16 you have that interpretation of what happened. I can address  
17 that directly and say it isn't what happened. It is so  
18 beyond not applicable on the facts, and it also not being an  
19 FAA case, that is in footnote 2 of *Burnett*. That is all I  
20 have on that, Your Honor.

21 If I may continue to address the merits of why *Burnett*  
22 does not apply here, I think it would be --

23 THE COURT: Can you explain to me the FAA argument a  
24 little bit more because I am looking at footnote 2 of *Burnett*  
25 and it says, "The same would be true if the Federal

1 Arbitration Act were applicable."

2 MS. OLIVER: Right. Meaning the Federal Arbitration  
3 Act was not applicable in *Burnett*.

4 The Federal Arbitration Act -- to the extent *Burnett* could  
5 be interpreted as creating some kind of special unique rules  
6 for arbitration clauses in employment agreements, normally  
7 under Washington law when you incorporate a document by  
8 reference, there is no requirement that the incorporating  
9 document include a preview of terms of the incorporated  
10 document.

11 If you would read *Burnett* to require that in a  
12 circumstance where there was reasonable notice -- again, I  
13 believe that is not how one should read *Burnett*. *Burnett*  
14 provides, quote, "arbitration agreements stand on equal  
15 footing with other contracts." I do think we should take  
16 that seriously.

17 If *Burnett* was read as treating arbitration agreements and  
18 employment contracts differently than other types of  
19 provisions, it would be preempted by the FAA. The FAA  
20 requires Congress to treat arbitration agreements just as it  
21 would any other contract. The United States Supreme Court is  
22 very clear on this point in *AT&T Mobility vs Concepcion*, that  
23 is 563 U.S. 333. The Court wrote -- regarding the final  
24 phrase of section 2 of the FAA which permits arbitration  
25 agreements to be declared unenforceable upon such grounds as

1 exist in law or in equity for the revocation of any contract,  
2 the court wrote: "This saving clause permits agreements to  
3 arbitrate to be invalidated by generally-applicable contract  
4 defenses such as fraud, duress, or unconscionability, but not  
5 by defenses that apply only to arbitration or that derive  
6 their meaning from the fact that an agreement to arbitrate is  
7 at issue."

8 Respectfully, I think *Burnett* should be read as hinging on  
9 the fact that the pizza delivery driver who showed up to a  
10 40-minute to an hour orientation and had no opportunity to  
11 read the attached handbook that was incorporated by  
12 reference, that was critical in *Burnett*. I don't think  
13 *Burnett* can be read as requiring circumstances where if a  
14 person has four days with an agreement that is clearly and  
15 unambiguously incorporated by reference into the agreement  
16 they signed, I do not think *Burnett* can fairly be read as  
17 requiring the signed agreement to provide special notice that  
18 there is an arbitration provision in the incorporated  
19 document, at least under the FAA. Also just the facts in the  
20 agreement.

21 I would like to return to that because the facts of  
22 *Burnett* are fairly extreme. Even *Burnett*, the pizza delivery  
23 driver, he showed up for a 40-minute to an hour training and  
24 was asked to sign an employment agreement to begin work. He  
25 was given the employee handbook, which was called "A Little

1 Book of Answers," but was expected to read it after signing  
2 the agreement on his own time. And even if Burnett had been  
3 able to skim that handbook during the orientation, he  
4 wouldn't have been able to find the arbitration agreement  
5 because it wasn't included in the table of contents and it  
6 was buried on page 18 under the fairly meaningless heading  
7 "mutual fairness benefits."

8 It was considering all of those facts that the court found  
9 there was no assent. He couldn't have known he was agreeing  
10 to arbitrate, and also the entire agreement was procedurally  
11 unconscionable.

12 This is not a case where Burnett had no way of knowing he  
13 was agreeing to arbitrate claims. He had four days to review  
14 the TCA, like I mentioned.

15 To highlight some evidence in the record on this point, in  
16 Mr. Erhart's declaration he attached Exhibit B, an August  
17 14th email, where he actually raised concerns about  
18 Switchboard's relationship with TriNet after receiving the  
19 initial version of the offer, which, like the final,  
20 incorporated the TCA.

21 Mr. Erhart complained that he didn't have insight into the  
22 contractual agreements between Switchboard and TriNet and  
23 therefore couldn't adequately evaluate the terms. He  
24 acknowledged that Switchboard was deprived of his employer,  
25 but shared he believed it was ill advised.

1 In response on August 17, this is Docket 22, Exhibit C,  
2 Switchboard's CEO Chris Hermida invited Mr. Erhart to discuss  
3 his concerns over the phone. Mr. Hermida says, "Hey, Brad,  
4 it might be easiest to just hop on a call and walk through  
5 each of your concerns." Mr. Hermida and Mr. Erhart did speak  
6 on August 17th. By Mr. Erhart's account, he asked for at  
7 least the TriNet Switchboard agreement. After this call,  
8 Mr. Erhart received the TCA attached to the August 19th email  
9 that we have discussed. That email reads, in part, "As  
10 requested, I have attached copies of Trinet's terms."

11 A few days later, Mr. Erhart signed the updated final  
12 offer letter, which incorporates the TCA very clearly,  
13 providing this offer letter, together with the TCA, forms the  
14 parties' agreement.

15 Mr. Erhart cannot dispute here, this is unlike the pizza  
16 delivery driver in *Burnett*, that he had an opportunity to  
17 review the agreement containing the arbitration provision.  
18 Not only that, Mr. Erhart isn't a blue-color employee. He is  
19 a professional software engineer with over 20 years of  
20 professional experience and held a senior position. He  
21 exhibited leverage and bargaining power in the negotiations.  
22 He had an opportunity to negotiate things, not just like the  
23 start date, but substantive terms of the offer. He received  
24 concessions from Switchboard. For example, Mr. Erhart  
25 requested that the offer -- the final offer letter include a

1 severance clause that wasn't in the initial offer letter  
2 using his own description of his reasoning for making that  
3 request. Mr. Erhart cited the broad nature of the parties'  
4 non-disclosure agreement. This is in his response, Docket  
5 21, F5. Mr. Erhart was carefully reviewing documents and  
6 negotiating the substance of the parties' agreement.

7 Mr. Erhart has suggested he didn't read the TCA, which I  
8 believe it is hard to imagine given the contemporaneous  
9 document. Even if true, what matters under *Burnett* is not  
10 whether he read the agreement but whether he could have,  
11 whether he had the reasonable opportunity to read the  
12 agreement.

13 The record is clear, Mr. Erhart agrees he did have a  
14 reasonable opportunity to read the agreement.

15 The second point I wanted to make today is the TCA itself  
16 has none of the concerning characteristics of the Little Book  
17 of Answers in *Burnett*. The terms and conditions agreement,  
18 this is Docket 18, Exhibit C, it is not an employee handbook.  
19 By its title alone, it signals it is an agreement containing  
20 binding terms. It also begins in all caps with the warning:  
21 Read this TCA carefully because it contains important  
22 information regarding the handling of any dispute arising out  
23 of your relationship with TriNet, your company, and related  
24 matters. Also, on page 1, the TCA includes a table of  
25 contents that is underlined and in bold. Section 8 reads:

1 "Dispute resolution protocol" -- I am quoting now -- "and  
2 mandatory arbitration of claims." Section 8 also has  
3 subsections A through F listed also on the first page on the  
4 table of contents. Those include starting arbitration, how  
5 arbitration proceedings are conducted.

6 My point is a reasonable person would know from a cursory  
7 review of just the first page of the TCA that they were  
8 agreeing to arbitrate.

9 To be clear, and I have made this point already,  
10 Your Honor, I just want to be clear that because Mr. Erhart  
11 had a reasonable opportunity to read and understand the TCA,  
12 at least on the issue of mutual assent, it doesn't matter  
13 that the TCA's arbitration clause is conspicuously previewed  
14 on page 1, parties are responsible for reading and  
15 understanding the terms of agreements they enter, conspicuous  
16 or not.

17 I do think that is fairly interpreted in *Burnett*. In  
18 *Burnett*, the reason it mattered on the issue of mutual assent  
19 was because that was the only way the employee was going to  
20 possibly know he was agreeing to arbitrate claims under the  
21 circumstances. It also matters for procedural  
22 unconscionability.

23 That's just not the case here. The TCA provides just  
24 another example of how this case differs so drastically from  
25 the circumstances that were present in *Burnett*.



1 I do want to turn to procedural unconscionability.

2 THE COURT: I don't need you to address that.

3 I would like you to address the *Nelson* case from the Ninth  
4 Circuit that is relied on extensively in *Burnett* for the  
5 proposition that "the waiver of the judicial forum by an  
6 arbitration provision must be explicitly presented to the  
7 employee, and the employee must explicitly agree to waive the  
8 specific right in question."

9 That, to me, is the most relevant part of *Burnett* for this  
10 case with respect to your argument about, well, he had the  
11 opportunity to read the TCA because, yes, he was sent the TCA  
12 in a separate email that was in response to a different  
13 question that he asked.

14 He asked Mr. Hermida for a copy of the PEO agreement  
15 between TriNet and Switchboard, which your client refused to  
16 provide and instead provided him two other attachments.  
17 There is still nothing in any of those communications that  
18 says, hey, by the way, you should read this really carefully.  
19 This is the attachment that is referenced in your letter or,  
20 you know, this contains our dispute resolution policy. You  
21 need to read it.

22 There is absolutely nothing that either flags there is an  
23 arbitration clause in this document or even expressly  
24 connects this document to it being what is incorporated by  
25 reference.

1 I know you have an argument based on the file name of the  
2 PDF that he should have put those things together. I have a  
3 hard time reconciling that with the language from *Burnett*  
4 that talks about the arbitration provision being explicitly  
5 provided to the employee.

6 MS. OLIVER: Respectfully, I just want to clarify a  
7 characterization that Switchboard refused to provide the PEO  
8 agreement. I think the record reflects Switchboard was in  
9 the process of doing that and it didn't happen. Not any sort  
10 of reason why that happened.

11 THE COURT: I thought he said in his email that I  
12 can't provide that to you, or something to that effect.

13 MS. OLIVER: Understood.

14 I will address *Nelson*. In *Nelson*, at issue was, first of  
15 all, ADA claims, which, to be clear, Mr. Erhart has contract  
16 and tort law claims against my client. There are ADA claims  
17 in the case, but not against Switchboard.

18 *Nelson* involved a receipt of -- an acknowledgement receipt  
19 of an employee handbook during the course of employment that  
20 was updated during the course of employment. The employee  
21 acknowledged receipt and continued employment.

22 Under those circumstances, the Ninth Circuit -- this was  
23 in, I think, the late '90s -- decided that there was no clear  
24 waiver of a right to a federal forum for an ADA case. That  
25 is not on all fours here. Quite frankly, I don't know how

1 you can require here these sort of previews or special notice  
2 requirements for the arbitration provision without running  
3 into a Federal Arbitration Act policy or problem --  
4 preemption problem. The Federal Arbitration Act is --  
5 requires we look at arbitration agreements just like we would  
6 any other contract. I am just not aware in Washington law of  
7 any generally applicable contract principle that for a  
8 document to be incorporated by reference specific provisions  
9 have to be called out or discussed in writing between the  
10 parties during the course of negotiations. I respectfully  
11 disagree with that reading of *Burnett*, and that reading of  
12 the requirements here.

13 THE COURT: The last thing I would like you to  
14 address is with respect to his claims for breach of the  
15 severance agreement. I don't really see that as a scope of  
16 arbitrability question. I really view that as an entirely  
17 separate contract where we are looking at that contract to  
18 see if it is in any way governed by arbitration.

19 I understand your argument with respect to whether the  
20 scope has been delegated to the arbitrator by inclusion of  
21 the JAMS rule. I am having a really difficult time  
22 understanding how that could apply to the breach of the  
23 severance agreement when the express language of the  
24 severance agreement says it supersedes any and all prior  
25 agreements and understandings between you and the company

1 concerning the subject matter of this agreement.

2 The subject matter of the severance agreement is the  
3 severance agreement, and that is what he has alleged was  
4 breached.

5 I have a really hard time understanding how there is any  
6 way that the earlier arbitration clause, even assuming it was  
7 valid, would still apply to a breach of contract provision  
8 for the separate contract with this kind of integration  
9 clause.

10 MS. OLIVER: I would like to address your delegation  
11 question first. I heard two questions here. One is on the  
12 issue of who decides this, the other is the merits.

13 On delegation, and we cited these cases in our briefing,  
14 the scope of this Court's review is very limited on a motion  
15 to compel arbitration to whether there exists agreement to  
16 arbitrate. The effect of a separate agreement on that  
17 initial agreement is delegated to the arbitrator. At least  
18 in the example I found, there are examples of courts finding  
19 this. I cited a case, *Jonathan vs Oracle*, this was in the  
20 Northern District of California, affirmed by the Ninth  
21 Circuit, holding a dispute about whether an arbitration  
22 agreement was superseded by later agreement should be decided  
23 by an arbitrator because the parties' unincorporated JAMS  
24 rules just as they did here.

25 What it comes down to, Your Honor, is that the Court's

1 inquiry here is a limited gatekeeping function looking for  
2 the existence of an agreement to arbitrate. It doesn't reach  
3 the validity of that agreement. It actually, as we argued in  
4 the briefing, doesn't reach issues of unconscionability  
5 unless it has been attacked specifically as to the  
6 arbitration provision. And similarly, the effect of a  
7 separate document on that agreement is an issue that is  
8 delegated to the arbitrator.

9 THE COURT: I guess what I am having a harder time  
10 trying to figure out how to determine is -- so assuming I  
11 agree with you about the JAMS rule delegating scope to the  
12 arbitrator, I still don't know that this separate contract  
13 claim, based on a separate contract, has anything to do with  
14 the scope of the agreement to arbitrate. It just seems to me  
15 like it is a totally new claim based on a totally new  
16 contract that arose after his employment was over.

17 Your argument makes it sound like even if he had a claim  
18 that came up five years later under a totally separate  
19 contract, that as long as your client asserts, oh, well, this  
20 is part of the scope, then I have to say, well, that's not  
21 part of what I review here.

22 What guides that determination?

23 MS. OLIVER: I would look to, Your Honor -- let me,  
24 if I may, have just a moment. *Henry Schein vs Archer & White*  
25 *Sales Inc.*, a Ninth Circuit case and Supreme Court case. It

1 is a limited gatekeeper function looking for existence of an  
2 arbitration agreement. The scope is similar, I guess, to  
3 your -- I see the question you are asking about what falls  
4 within issues of scope and other types of issues about  
5 enforceability. It is not just the scope that is delegated  
6 necessarily by incorporation of the JAMS rules. It is also  
7 the validity of the agreement, whether the agreement is  
8 unconscionable as a whole and the effect of other agreements.

9 Respectfully, it is broader. The issues that are  
10 delegated by virtue of incorporating the JAMS rules are  
11 broader than is this claim listed among those in the  
12 arbitration provision.

13 On the merits of the separation list, the scope of the  
14 separation agreement is the termination. It does not  
15 supersede -- fairly read, the agreement supersedes other  
16 agreements as to that subject matter that would include  
17 certain provisions that are listed in the separation  
18 agreement. It wouldn't overhaul or supersede the general  
19 dispute resolution process that, by its own language,  
20 survived termination of the agreement.

21 THE COURT: It survives termination, but that makes  
22 sense to me with respect to claims that are covered, claims  
23 that arose during employment, claims that would be covered by  
24 the arbitration provision. Where it doesn't make sense to me  
25 is a claim that arises entirely after his employment is ended

1 and after he signed a severance agreement that creates just a  
2 totally new contractual obligation that is not related to his  
3 original -- it is not arising from his original -- it is a  
4 new contract. Seems to me like for a breach of contract  
5 claim, you look at that contract and what the parties agreed  
6 to in that contract. You would be looking at is there  
7 anything in this contract that shows an intent to arbitrate.  
8 That is the difficulty I am having with respect to the breach  
9 of the severance agreement.

10 MS. OLIVER: Understood, Your Honor.

11 I would say two things. One, that does go just plainly to  
12 the scope. Your Honor might be adopting a narrower view of  
13 the term "arising out of the employment." Our position is  
14 that everything basically that Mr. Erhart has alleged in the  
15 complaint as with respect to Switchboard has arisen out of or  
16 relates to his employment with Switchboard, which is the  
17 language of the dispute resolution policy that, again, by its  
18 own terms survived termination. That is a question properly  
19 before the arbitrator as to whether there is some claim that  
20 Mr. Erhart brings that did not fall within the scope of that  
21 provision. The separation agreement doesn't change that.  
22 The separation agreement itself arises from the parties'  
23 employment relationship.

24 THE COURT: I have one last area that I wanted you to  
25 address, which is in terms of stays versus dismissal for

1 claims that are subject to arbitration. I understand the  
2 Supreme Court recently granted cert on this issue. Given  
3 that, doesn't it make the most sense to stay any claims  
4 against your client until the Supreme Court resolves whether  
5 dismissal is even allowed?

6 MS. OLIVER: Our position is this is just a  
7 discretionary decision by you. We have asked for dismissal  
8 and think that is an appropriate choice. Yeah. Yes, it is  
9 possible that if Your Honor wanted to stay the case and  
10 arbitration, we certainly see merit to that.

11 I would like to address one more point on just the  
12 separation agreement just to highlight. Mr. Erhart has  
13 claimed in this lawsuit that the separation agreement was  
14 fraudulently entered and is now using the separation  
15 agreement as a valid and binding agreement and suggesting it  
16 supersedes the parties' agreement to arbitrate. We agree it  
17 is valid and binding. We have a different reading of the  
18 superseding clause. I did want to highlight just that as it  
19 might have an impact on this case.

20 THE COURT: Mr. Erhart, I would like to hear from  
21 you.

22 MR. ERHART: Thank you, Your Honor. May it please  
23 the Court.

24 First, I would like to apologize about not including more  
25 case law in my oppositional brief. Being pro se, this is a



1 new process for me, so I spent a lot of time trying to get  
2 what I did done. Unfortunately, I didn't have the  
3 opportunity to really understand the need or what case law  
4 would be applicable or how to adequately reference that.

5 I do have a better understanding now. I would like to  
6 respond to several things that were discussed.

7 First, there is some accusation I agreed to certain  
8 things. I want to make it clear that is not the case. I  
9 know we are here primarily to discuss *Burnett*. I would like  
10 to really point out that no two cases are ever going to be  
11 exactly the same. There is different circumstances in every  
12 case. Really, when you look at *Burnett*, it really touches at  
13 the heart of what qualifies for, if something is considered  
14 to be assented to. They discuss several cases in there that  
15 I really think touches on the heart of the topic.

16 I would like to point out, I know that one of the most  
17 important factors you are considering is the separate email  
18 sent by Switchboard. There was no notice or any like -- I  
19 know they claim that the outward expression is what matters  
20 the most. There is no outward expression that they intend to  
21 arbitrate. They never mention it in the offer letter. They  
22 never mention it in the separate email that was sent. The  
23 separate email that was sent was a completely different  
24 topic. It was in regard to the PEO contract.

25 I did, you know, spend some time after interviewing for

1 approximately a month, which was a long time. It is a long  
2 time to commit to a company that you are not getting anything  
3 from at the time. Based on the employment non-disclosure  
4 agreement they attached alongside the initial offer letter, I  
5 would like them to include a severance clause, because it was  
6 rather broad and I read it because it was attached and cited.  
7 It specifically mentioned the offer letter, requested it be  
8 signed, unlike the TCA that they alleged be -- the TriNet  
9 Terms and Conditions Agreement. The email sent by  
10 Switchboard never even referenced the document as the TCA.  
11 They -- Mr. Hermida -- Mr. Hermida only stated it was the  
12 TriNet terms, which I had no reason to believe that it had  
13 any relevancy to my agreement with Switchboard.

14 Later in the offer letter, they use an acronym for the  
15 document which I know that they want to make it seem like,  
16 you know, after four days of maybe even glancing at a  
17 document I would remember everything in it. I work in  
18 technology, so I have to process a lot of information.  
19 Sometimes I have to forget the things that don't seem  
20 relevant. It didn't seem relevant. It had TriNet's name on  
21 it. It was a document that -- their argument is that because  
22 I received it, well, they also sent the employee handbook  
23 they claim is the Switchboard employee handbook, which is  
24 actually the TriNet employee handbook.

25 Everything in the employee handbook, if they want to

1 allege I had an opportunity to read the documents they sent  
2 me, only state that it would be later agreed to through  
3 TriNet's platform where they would send an email that would  
4 indicate I had accepted the agreement.

5 There is nothing in there that would indicate by signing  
6 the offer letter that I would be agreeing to any type of  
7 arbitration. The only thing they claim is it would be -- the  
8 TriNet terms agreement would be something that would be later  
9 provided through TriNet's platform.

10 There is nothing in there from an outward expression that  
11 shows that there is an agreement to arbitrate.

12 I think that is directly relevant in *Barnett* (sic) because  
13 even in *Barnett* they specifically state that incorporation by  
14 reference does not even in itself establish mutual assent.  
15 Even if it was determined that the TriNet terms and  
16 conditions agreement was adequately incorporated, which I  
17 disagree with, it doesn't establish assent. There is nothing  
18 in the documents that they provided.

19 I have clearly provided the evidence to show that there is  
20 nothing to show that I had assent to that. The documents they  
21 attached, it clearly had a check box for -- to opt out of the  
22 class action waiver which, based on their argument of  
23 incorporation, they are stating they didn't even provide me  
24 with the option for doing that.

25 Even reading the TCA itself, it has its own separate

1 acknowledgement requirement. It seems very difficult to  
2 incorporate another document that is asking the document  
3 itself to be signed. Seems like in that case, that even  
4 based on their alleged incorporation, in that case reading  
5 the document, stating it needs to be signed, even if they  
6 incorporate it, they incorporate the rules of signing the  
7 actual separate document. They don't state any section they  
8 were incorporating, which I think would be necessary to  
9 incorporate the document that has its own explicit signing  
10 requirement.

11 If they want to incorporate specifically what they are  
12 claiming is the TriNet terms, they would need to make  
13 reference to that itself and claim that it is being  
14 incorporated or integrated. Otherwise, just based on their  
15 claimed incorporation, seems like it would incorporate the  
16 full document, which doesn't even apply to Switchboard. They  
17 could be a potential beneficiary to the document. The  
18 document itself doesn't apply to Switchboard. It is a TriNet  
19 copyright document, has TriNet copyright on the document  
20 itself. Specifically mentions TriNet throughout the  
21 document. It has no reference to Switchboard in the document  
22 whatsoever. We are going off the assumption that Switchboard  
23 has signed a customer agreement with TriNet.

24 TriNet responded in this case already that they were not  
25 my employer, which in the TCA itself explains that a customer

1 that would be a beneficiary to the agreement would have  
2 entered into an agreement where TriNet would be a  
3 co-employer. I don't understand how somebody can be a  
4 co-employer but not an employer. It doesn't make any sense.

5 I would like to also mention in *Barnett*, the important  
6 thing, I think, that was discussed is that he still had no  
7 knowledge of the arbitration provision terms when he signed  
8 the document.

9 I had no reason to really familiarize myself with the TCA  
10 at the time. I requested the severance agreement clause,  
11 which was important to me. The other documents for TriNet,  
12 after speaking with Mr. Hermida, which he was very reassuring  
13 that everything was fine and he included that, it seemed like  
14 both of those documents, even based on their description, is  
15 something that is provided after signing the employment offer  
16 letter and starting your employment.

17 The e-mail sent by TriNet on August 31st explains that  
18 they are providing the documents at that time. I don't think  
19 they were ever sent. I don't think it is even part of  
20 TriNet's normal process or part of what they claim is an  
21 employer normal process to provide the documents to its  
22 employee. It was only done in this case in regards to my  
23 prior inquiry regarding the PEO contract.

24 It is completely outside the norm. They didn't provide  
25 any notice of them intending to incorporate the document.

1 They didn't provide any notice of including an arbitration  
2 agreement that would apply to Switchboard.

3 I would also like to point out in my brief, I do make some  
4 other arguments that I do feel are still relevant here. I  
5 know that Switchboard argued -- continues to argue they  
6 believe that the arbitrator has delegation for the matters.

7 I would like to point out I did directly, you know,  
8 question and in my brief claim that even the delegation would  
9 have been fraudulently induced. I believe (inaudible) is  
10 clear in the Ninth Circuit -- I can't reference the specific  
11 cases to you at the moment. I would have to try to pull up  
12 another tab. I have read it recently. I am confident the  
13 Ninth Circuit has determined that as long as you adequately  
14 specifically question the delegation provision as part of  
15 your argument, as I have done here, that the arbitrator does  
16 not have delegation. It is ultimately in your hands at that  
17 point to make those determinations.

18 I don't believe that their argument that the arbitrator  
19 has delegation at this point would even be accurate. I  
20 clearly disagree there is even an agreement to arbitrate  
21 here.

22 The severance agreement itself, I know that -- I like the  
23 point that was made in regards to -- what they are arguing  
24 here is these are claims that occurred after, after  
25 termination, after employment. They are claiming that there

1 is still an arbitration provision. Actually, what they are  
2 claiming is there probably isn't, but it is still up to the  
3 arbitrator to decide everything forever in eternity. That  
4 doesn't make sense to me. Five years from now I could get  
5 assaulted by a Switchboard employee and they could claim they  
6 still have arbitration pertaining to my employment. There is  
7 no bounds to this, what they are claiming is this ongoing  
8 arbitration clause. You know, I don't foresee how that, you  
9 know -- I believe, you know, there would need to be some kind  
10 of restriction as to matters that occur after employment.

11 Clearly this is something that -- I do allege that the  
12 claims against Switchboard -- you know, I may amend my  
13 complaint at some point, but I do allege that they are  
14 related to my termination. That doesn't mean that, you know,  
15 the issues themselves are in regards to breach of contract,  
16 which occurred after.

17 I guess, you know, they could claim the conspiracy claim  
18 is related to my employment. I don't see how they could  
19 claim the breach of contracts would be. I do also adequately  
20 argue, I think it is important to note specifically the TCA  
21 that they allege is incorporated, it doesn't even provide  
22 delegation. It mentions the JAMS rules. This is like a  
23 document in a document in a document that they are claiming  
24 assigns arbitration to the arbitrator.

25 I think that is important in *Barnett* as well because that

1 is one of the issues, is how many levels deep can we go in  
2 what they are claiming is references to other documents.  
3 There is no delegation in the TCA itself. It just says  
4 "incorporates the JAMS rules." Then what they are suggesting  
5 is I have to go read the JAMS rules as well and fully  
6 understand those, which is a very lengthy document.

7 From after initiating this case and looking at them, seems  
8 like only delegation would be something later on and a very  
9 longer page, even within the JAMS rules. I think *Barnett*  
10 really touches on that in regards to it being imbedded in the  
11 document. The same thing with the TCA. Even the email that  
12 they provided, you know, just a cursory glance, there is no  
13 reason for me to really go down and read a bunch of the  
14 terms, especially when it is not relevant to the offer letter  
15 itself.

16 So I don't see -- I think there is a lot more relevancy to  
17 *Barnett* here. I don't think, in *Barnett*, that really what  
18 was considered was just the -- whether they had an  
19 opportunity to read it. I think it was more based on whether  
20 there was ever actual mutual assent. The cases they have  
21 evaluated in *Barnett* all touch on that specifically. I don't  
22 think it even matters whether it was provided before in  
23 *Barnett*. I don't think that is what the case is about.

24 They touch upon the procedural and substantive  
25 unconsciousability (sic). The procedural unconsciousability



1 here would be that they never provided any notice that there  
2 is an arbitration agreement. I think that is directly  
3 discussed in *Barnett*. That's where they touch on the issue  
4 of mutual assent and determine that there is procedural  
5 unconsciousability. And so I think that is one factor. I  
6 did make multiple arguments in my brief I also believe should  
7 be relevant in that matter.

8 From my understanding, *Barnett*, even though it is not the  
9 same type of case where I -- you know, I think in *Barnett* he  
10 wasn't actually given the employee handbook until after he  
11 started employment. Well, in this case, there would have  
12 been no notice of any arbitration agreement. To my  
13 knowledge, there never was until after starting employment as  
14 well.

15 I don't see how they can argue that they are that much  
16 different. To me, they seem very much alike.

17 THE COURT: All right. Thank you, Mr. Erhart.

18 Do counsel for either of the other two parties wish to be  
19 heard at all on this motion?

20 MR. WOOD: Not today, Your Honor.

21 MS. SWALE: No, Your Honor. Thank you.

22 THE COURT: Ms. Oliver.

23 MS. OLIVER: Your Honor, of course, I will address  
24 any other questions you have.

25 We spent a fair amount of time on the alternative

1 hypothetical world where Mr. Erhart never received the TCA.  
2 That's not what happened. We have to look at the  
3 circumstances of the actual transaction. Mr. Erhart received  
4 the Terms and Conditions Agreement with several days to  
5 review it. He also -- admittedly, it was sent to him because  
6 he asked about the relationship with Switchboard and TriNet.

7 This is not like *Burnett*. *Burnett* was about timing  
8 fundamentally on the issue of mutual assent. *Burnett* was  
9 about timing. The employee had no opportunity to review and  
10 understand the terms.

11 On Mr. Erhart's issues with whether the offer letter  
12 incorporates by reference the TriNet document that was  
13 signed, we addressed that in our briefing.

14 I want to briefly cover (inaudible) contract. This has  
15 been cited by the Washington Court of Appeals, for example,  
16 in the *Seventh Day Adventist* case. As long as the contract  
17 makes clear reference to the document and describes in such  
18 terms that its identity may be ascertained beyond doubt, the  
19 party to a contract may incorporate contractual terms by  
20 reference to a separate non-contemporaneous document  
21 including a separate agreement to which they are not parties  
22 and including a separate agreement that is unsigned.

23 There is no prohibition under Washington law. In fact, it  
24 is quite standard to incorporate agreements by reference.

25 Mr. Erhart received the TCA with plenty of time to review

1 it. The record shows Mr. Erhart was carefully reviewing and  
2 negotiating his offer. He had opportunity to ask questions  
3 about the agreement.

4 The Ninth Circuit in a recent -- this district in recent  
5 decision -- this is from Judge Robart granting a motion to  
6 compel arbitration in *Briggs vs* -- this was February 17th,  
7 2023. The plaintiff had clicked an "I agree" button in close  
8 proximity to text that read: "By selecting the 'I agree'  
9 button, you acknowledge and agree to the mutual resolution  
10 agreement." That is all that it said.

11 Even though the text didn't use the word "arbitration," or  
12 wasn't particularly clear that it was attaching an  
13 arbitration provision, Judge Robart found the hyperlinked  
14 document was an agreement to arbitrate. Most importantly,  
15 the plaintiff had time to review, wasn't given a clock, and  
16 had time to review that hyperlinked document.

17 That is, as a practical matter, much more sort of obscure  
18 than what happened in this case.

19 Let me check my notes to see if I had anything else.

20 THE COURT: I am curious why there isn't that type --  
21 if the document seemed to lay out that he was supposed to  
22 have had to go through and review and click to accept it to  
23 ever get a paycheck, I guess one other thing that stood out  
24 to me while reviewing all this is why isn't there a signed  
25 version of this agreement?

1 MS. OLIVER: We don't know if there is or not,  
2 respectfully. Mr. Erhart would have clicked through the  
3 agreement on TriNet's portal. We just don't have that  
4 information as to whether or not that happened in this case.

5 I will say the offer letter itself is unambiguous. The  
6 TCA, among other documents, forms the complete agreement.  
7 Here, Mr. Erhart, being a sophisticated professional with 20  
8 years of experience in negotiating a contract, being  
9 concerned with TriNet's involvement in the contract, had an  
10 opportunity to -- if he didn't know what the TCA was at the  
11 time, he certainly had an opportunity to ask; in fact,  
12 exhibited that he was asking about the parties' relationship.  
13 The TCA was sent to him.

14 The only other thing I wanted to address from Mr. Erhart's  
15 comments, this idea that -- and Your Honor raised a similar  
16 concern as well -- this idea that if Mr. Erhart is assaulted  
17 years down the line by a Switchboard employee, would that be  
18 submitted to arbitration.

19 The question of the scope of the arbitration agreement  
20 goes to the arbitrator. It can ultimately be determined the  
21 claim is not properly in arbitration and Mr. Erhart would get  
22 a judicial forum. It is not the be all, end all that the  
23 Court grant a motion to compel arbitration. I just wanted to  
24 make that clear.

25 That is all I had, Your Honor, unless you have further

1 questions for Defendant Switchboard.

2 THE COURT: I do not have further questions.

3 Thank you all for your arguments today. We will take the  
4 motion under consideration.

5 MS. OLIVER: Thank you.

6 THE COURT: Thank you, everyone.

7 (The proceedings adjourned.)

8  
9  
10 C E R T I F I C A T E

11  
12  
13 I certify that the foregoing is a correct transcript from  
14 the record of proceedings in the above-entitled matter.

15  
16  
17  
18 */s/ Angela Nicolavo*

19 ANGELA NICOLAVO  
20 COURT REPORTER  
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